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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 741

CHASE BRASS AND COPPER CO., INCORPORATED,
Appellant,

vs.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellee.

Brief of Appellant in Opposition To Motion To Dismiss Or Affirm

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Appellee's Motion to Dismiss or Affirm is without merit and should be denied. Probable jurisdiction should be noted, since the case presents substantial federal questions.

Appellee's motion creates a false impression of the content of the record in this case, and hence of the basis on which the California courts decided the case. It is necessary that we reply to correct that false impression about the facts in the case, because constitutional rights exist in relation to facts, not *in vacuo*. We will also reply to appellee's legal arguments where we consider reply warranted.

A. THE FACTS.

1. The Federal Trade Commission report and the economic essay relied upon by appellee (Motion, pp. 20-23) were not in the record in the State courts. While the California courts could take judicial notice of them, they were not evidence in the case. Accordingly, when the Court of Appeal stated that the evidence was uncontradicted, it was referring to that placed in evidence by the parties and not to opinions of non-witnesses. That evidence included the testimony of witness Carl Lentz, President of Kennecott Sales Corporation. Mr. Lentz testified that during most of the three years herein involved (1954-1956, inclusive) the demand for copper exceeded the supply (R.T. 96-97) so that Kennecott Sales Corporation was compelled to place its customers on allocation (R.T. 97), and that Chase was subject to the same allocation that other customers were. (R.T. 96; also Stip. 21, Juris. Statement, App. p. 44.) This allocation, he testified, was based upon the record of purchases of the particular customer in the past, in which Chase was treated exactly as were other customers. He also testified that Chase bought on the same terms and at the same price as other customers, and that the same applied to Chase's competitors. (R.T. 99; Stip. 21, Juris. Statement, App. p. 44.) Finally, he testified that the producer's price charged by Kennecott, Phelps Dodge and Anaconda was ordinarily less than the price on the London Metal Exchange, which the smaller producers and the custom smelters such as American Smelting and Refining Company charged their customers. He testified that when Chase and others had to supplement their supply from those sources they had to pay a higher price than when they purchased from Kennecott. (R.T. 115-116; see also Stip. Findings, Juris. Statement, App. p. 17.)

The Federal Trade Commission study, published in 1947 and involving facts reported to the F.T.C. in 1937, did not involve the years 1954, 1955 and 1956, and if it did would be contrary to the evidence in the record, summarized above. Since the Court of Appeal called the evidence uncontradicted, it had to be referring to Mr. Lentz's testimony and the stipulation of facts. Hence there could have been no possible basis for the Court of Appeal disapproving the finding of the trial court that:

> "Chase's income and expenses all arise as a result of arm's length dealing at market prices. * * * The only substantial business contact between Chase and Kennecott was Chase's purchase of unwrought copper from Kennecott. This sole substantial contact was governed in all particulars by the operations of an independent marketplace.
>
> "Kennecott does not need to own Chase in order to sell its copper. Since all copper sales from Kennecott to Chase are at arm's length prices and since Chase is treated by Kennecott as Kennecott treats any of its other customers, * * *." (Juris Statement, App. p. 20.)

The same comment applies to the citation by appellee of the Yale University economic essay.

Appellee suggests that we do a "disservice" to both the Board and the Court of Appeal by supposing that either of them relied on the facts in the record instead of on these economic studies dealing, apparently, with other periods when the facts must have been different. We do not know what the Board relied on, but we do know what the Court of Appeal relied on: it relied on the evidence in the case, and the only evidence it could find containing what it thought were unitary characteristics was that which it analyzed in its opinion. Appellee (Motion, p. 24.) seems to join us in feeling that the supposed unitary incidents relied

on by the Court of Appeal are minor and would not justify the Board in having acted as it did. Indeed, appellee calls them "supplemental" and says that they are not "the touchstone of the Board's determination." The Board did not, however, place these studies in evidence, and had it done so they might not even have been received, since they did not relate to the years before the court. Mr. Lentz's testimony did, however, and it was acknowledged by the Court of Appeal to be uncontradicted.

The quotation of a statement made in 1958 by a vice president of Kennecott is in a different posture, because it is in the record through an exhibit in the trial court. That extract is from a recommendation made by that executive that Kennecott should buy the stock of Okonite, for the benefit the acquisition would be "to the *future* marketing of Kennecott's refined copper." The balance of that gentleman's recommendation shows that Kennecott anticipated enlarging its productive capacity (as does Stip. Exh. G), and was concerned with the future. The future as seen in 1958 does not include the years 1954, 1955 and 1956. We do not understand why appellee believes that we should have pointed this out to the Court, since had the Court of Appeal considered this a relevant fact it would have created a contradiction with Mr. Lentz's testimony, and the Court of Appeal, as appellee itself has pointed out to the court, stated that the evidence was uncontradicted.

Mr. Lentz's testimony contained an additional interesting fact, which was relied on by the trial court for a finding.[1] This was his testimony that on one occasion Chase's sales executives asked Mr. Lentz to use his good offices with some

1. "Neither Kennecott nor Kennecott Sales has ever used its market position to help Chase or Kennecott Wire acquire a customer, although the opportunity to do so has existed." (Juris Statement, App. pp. 19-20.)

customers of Kennecott to persuade them to purchase some of Chase's products from Chase, and Mr. Lentz refused, taking the position that Kennecott Sales could not do favors for Chase which it would not do for any other customers. (R.T. 125-126.) This testimony buttresses the conclusion that the relationship between Chase and Kennecott was governed by the factors of the marketplace and arm's length dealing.

2. Appellee has stated that the Court of Appeal exercised a prerogative under California law to disagree with the findings of fact of the trial court on the ground that they were conclusions of law since the evidence was uncontradicted. If by this appellee means that the Court of Appeal was free to disregard uncontradicted evidence and substitute findings of fact inconsistent with the uncontradicted evidence, it accuses the California court of something we do not. We believe that the California Court of Appeal followed more traditional judicial practices, and concluded that the evidence was conclusive. The evidence we refer to is that which caused the trial court to find that:

> "The apportionment formula used by defendant operates to assign to Chase income earned by the income earning activities of Kennecott, Braden, and Kennecott Sales * * *
>
> "Chase's business activities are not so interrelated with the business activities of the other corporations as to make possible the earning of income by Chase or any of the others which is not properly reflected in each's separate books of account * * *
>
> "Since all copper sales from Kennecott to Chase are at arm's length prices and since Chase is treated by Kennecott as Kennecott treats any of its other customers, Kennecott's ownership of Chase permitted neither Kennecott nor Chase to earn more than either might have in the absence of that ownership." (Juris. Statement, App. p. 20.)

Those findings of fact are indeed findings of fact, and are not legal conclusions. They are supported by evidence in the record which the Court of Appeal regarded as uncontradicted. What the Court of Appeal did, contrary to appellee, was to treat those findings of fact as irrelevant to what it considered to be the ultimate issue in the case, which was whether or not Chase was unitary with Kennecott. There was also a finding that there was "no need to resort to an artificial redetermination by formula of the incomes of each corporation." (Juris. Statement, App. p. 20.) This was the finding the Court of Appeal said was to be treated as a conclusion of law.

We do not regard the question whether Chase was unitary with Kennecott as the ultimate issue in the case, since the evidence shows that to treat them as unitary by the use of a combined allocation formula is to distort Chase's income by allocating some of Kennecott's income to it, which the record shows is income which it could not possibly have earned itself. The income came from Kennecott's great mines in Utah and elsewhere, none of which are in California. California has no jurisdiction to tax Kennecott's income.

3. Appellee refers to the stipulation that in 1955 Kennecott appointed an assistant to the president to be of assistance to the subsidiaries as if that were a stipulation that in the years in question he actually contributed to the operations of Chase.[2] We did not mention it before because the Court of Appeal did not do so, and did not rely on it. It could not well have done so, because the stipulation is silent about the contributions of that official to Chase. So

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2. The exact language of that portion of the stipulation of facts is "In December [1955], Mr. D. Ayers was appointed Assistant to the President to assist the subsidiaries with their engineering problems. Mr. Ayers was formerly Chief Engineer of Wheeling Steel Corporation." (Exh. B, Stip., p. 20.)

far as is disclosed by the stipulation, that official did not visit Chase, did not consult with any Chase executive, or in any way contribute anything to Chase or its operations. That appointment is therefore not evidence that Chase and Kennecott were unitary.

4. Appellee argues that the trial court's finding that Chase did not enjoy special favors from Kennecott is wrong because the allocation system in effect when demand outruns supply favors Chase. This argument is squarely contrary to the findings,[3] and is based entirely on the speculation that the base period used in determining entitlement must have included years when supplies were easy and Chase's competitors bought elsewhere. The use of speculation to overturn findings is strange. The Court of Appeal did not disapprove the finding. Cf. Juris. Statement, App. 10.

Appellee's speculation, even absent the finding, would be the sort this Court declined to permit in *Norfolk & Western Ry. Co. v. Missouri Tax Comm.*, 390 U.S. 317. There is a contrary finding, however.

The record contains evidence contrary to appellee's speculations. Plaintiff's Exhibit 3 is the *Year Book of the American Bureau of Metal Statistics*. Page 17 of that Exhibit shows the domestic copper stocks from 1942 to the end of 1956, a period of 15 years. It shows a deficit in copper supplies available to fabricators[4] continuously throughout that period except for the last seven months of 1956, and emphasizes the significance of the deficit by the statement that the available supplies were augmented beginning in 1951 by releases from the government stockpile.

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3. "In times of copper shortages, Kennecott does not supply its subsidiaries copper more favorably than it supplies its other customers." Juris. Statement, App. p. 20.

4. Chase is a "fabricator."

Hence the prior periods of oversupply which appellee's speculation assumes existed are shown by evidence not to have existed since 1941, and the record is silent whether they existed earlier.

Moreover, appellee's speculation assumes (Motion, p. 27) that the copper from scrap and from custom smelters would be less expensive than the producers price Kennecott Sales charged. Mr. Lentz testified that in times of copper deficit the producers price, which was stable, would be from one cent to twenty-one cents less than the other prices, which were more volatile. (R.T., 115-116.) With an almost continual copper deficit for 15 years, no Kennecott customer could afford to buy from anyone not selling at the producers' price, to the extent of available allocations.

B. THE LEGAL CONTENTIONS.

1. Appellee seems not to know that Public Law 86-272 contains a provision prohibiting the assessment of taxes for prior years, if the assessment should be attempted after the effective date of that public law. (15 U.S.C. Sec. 382.) The Public Law was passed in 1959. The assessments herein were proposed on August 31, 1960 (Exhibits N-1, N-2, N-3). Therefore, they were prohibited by the statute. The text of that provision in the Public Law is set forth in the appendix hereto.

Accordingly, the question whether California can succeed in circumventing the prohibitions of that Public Law is directly presented in this case and should be considered by this court.

2. There are no decisions from this court sustaining what the court below did, and appellee has cited none. It relied primarily on *Butler Bros. v. McColgan,* 315 U.S. 501, and the dismissal by this Court (343 U.S. 939) of the appeal from the decision by the California Supreme Court in *John*

Deere Plow Co. v. Franchise Tax Board, 38 Cal. 2d 214, 238 P.2d 569. The issue raised here was not raised in either case. *Butler Bros.* involved a single corporation and a question of geographical allocation of the income of that corporation. The issue raised in the *John Deere* case was the same, and no issue about the propriety of consolidating several corporations was raised.[5]

3. Appellee's argument is basically that it has not taxed the income of Kennecott or the other corporations. In form what appellee says is true, because it has assessed the tax on their income against Chase. In substance, of course, it is not. If, as the trial court found and the evidence shows, Chase could not possibly have earned the income assigned to it by the Board, and that income is attributable, as found by the trial court, to the Kennecott operations, it follows that what California is doing is taxing Chase measured by Kennecott's income. We find it impossible to comprehend appellee's insistence that this obvious truth does not exist. Again we find the most appropriate metaphor in fantasy:

> "Alice laughed. 'There's no use trying,' she said: 'one *ca'n't* believe impossible things.'
>
> " 'I dare say you haven't had much practice,' said the Queen. 'When I was your age, I always did it for half-an-hour a day. Why, sometimes I've believed as many as six impossible things before breakfast.' " Lewis Carroll, *Through the Looking-Glass,* ch. 5.

4. The only corporation in the group which the Court of Appeal held unitary which does business in California is Chase. Therefore, California's jurisdiction is dependent on

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5. Appellee has seen fit to mention that appellant's counsel was attorney for the taxpayer in the *John Deere* case, and to attempt to make capital of the fact. Personal references of that type are regrettable. Since it has been made, counsel should also reveal that he was counsel for the state in the *Butler Brothers* case. If any implication flows from these facts, it may be that he is familiar with the facts, arguments and decisions in those cases.

its jurisdiction over Chase. For this reason, it does not matter whether or not Kennecott is unitary with Kennecott Sales, or with Kennecott Wire. For this reason we did not discuss those relationships in our Jurisdictional Statement. Only if the relationship between Chase and Kennecott is unitary has California any jurisdiction over Kennecott so that the question of Kennecott's relationship to its other subsidiaries can arise. However, the question whether Chase and Kennecott are unitary is merely the threshold question in the case, since even if they are, the consolidated formula cannot be applied if the effect is to distort. This was made abundantly clear, we believe, by this court's decision involving an obviously unitary business in *Norfolk & Western Railway* v. *Missouri Tax Comm.*, 390 U.S. 317.

Appellee's statement of its position in its summary of argument (Motion, p. 7) is a succinct statement of its erroneous thinking. Appellee there says that "[i]n this case the Court of Appeal held that the four corporations were unitary and that, therefore, *a* formula should be used." This is supposed to be a distinction of the *Norfolk & Western* case. However, in the *Norfolk & Western* case a single corporation was engaged in a unitary business, and one which is the original, classic example of a unitary business. If that circumstance were sufficient to justify the use of a formula, then the formula in the *Norfolk & Western* case should have been sustained. This court did not sustain it. It held the statutory formula unconstitutional. That is what we ask be done here. The evidence in the *Norfolk & Western* case showed that the formula produced a distorting result and the evidence here does the same thing. The Court of Appeal declined to consider the evidence of the distorting effect, and concluded that it was sufficient to justify the use of the formula that the businesses be unitary.

While we deny that they are unitary, that is still merely the threshold question, not the ultimate question. The ultimate question, as this court held in the *Norfolk & Western* case, is whether the formula seriously distorts. Since it multiplies Chase's corporate net income sevenfold, it distorts in a serious measure.

Appellee further attempts to distinguish the *Norfolk & Western* case by claiming that it is not relying on any unitary enhancement theory to justify its consolidated formula (Motion, pp. 38-40). It appears to us that appellee has mesmerized itself into a state of unthinking acceptance of its own righteousness. It has clearly lost sight of the historical justification for the use of apportionment formulae in unitary businesses.

Appellee's argument shows that the historical support for apportionment formulae is challenged by California, and that California asserts the right to use its formula regardless of the absence of unitary enhancement, regardless of the distortions it produces, merely because of common ownership, and of minor incidents of common operation such as must normally flow from common ownership.

It is apparent that appellee's analysis of its own defense presents a substantial federal question.

5. Again here, as it did below, appellee calls any evidence relevant to the case "separate accounting." Separate accounting is not a phrase found in the Constitution, but it has been used by this Court and other courts, and when used by this Court it has been used to describe one process for making a geographical division of the income of a single corporation; i.e., it is an effort to determine how much of the net income of a *single* corporation is derived from a particular taxing state. See H.Rep. No. 1480, Vol. I, p. 115, 88th Cong., 2d Sess. (1964). To apply that concept,

with the recognition of its inadequacies, to the well seasoned techniques for determining the net income of a corporation, from its overall operations in all geographical locations in which it operates, is a confusing tactic. The figures used to determine corporate net income are not suspect; they are derived from the same source as those used in the formula, i.e., the taxpayer's books. Even the net incomes are the same, except that in one instance they are first scrambled and then unscrambled, and in the other they are as shown by the books. None of that is true of geographical allocation by separate accounting.

However, if "separate accounting" means to the Court what it means to appellee, then the evidence which this Court held overturned the Missouri statutory formula in *Norfolk & Western Ry. v. Missouri Tax Comm.*, 390 U.S. 317, was separate accounting.

6. Appellee misuses this court's decision in *General Motors Corp. v. District of Columbia*, 380 U.S. 553. This court did not decide that the business of General Motors was unitary, because the parties conceded that it was. Had that fact been in issue, however, this court would have learned from the evidence that there is much more than "centralized departments which handle such matters as accounting and insurance which tie together otherwise operationally independent divisions" (Motion, pp. 17-18). The Court would have learned that what appellee terms "operationally independent divisons" use interchangeable bodies, sparkplugs, brakes, transmissions, power steering, air conditioning and batteries, as well as chassis purchased from the same outside source. For instance, a Chevrolet Impala uses the same body shell as a Buick Le Sabre and a Pontiac Catalina, and Cadillac uses the same body shell as the Buick Electra and the Oldsmobile 98. The record

would have shown that all makes of General Motors cars obtain their power steering from the Saginaw division of General Motors, all use sparkplugs from its A-C division, and all obtain their batteries from its Delco division. The record also would have shown that they all purchase their brakes from Bendix, and their chassis from Dana, both outside suppliers. Since appellee characterizes this relationship as "operationally independent divisions," we are at a loss to understand why it regards our operationally independent corporations as unitary.

7. Appellee (Motion, p. 5) compares the relationship between Chase and Kennecott to that of the fabricating subsidiaries of Anaconda and Phelps Dodge with their respective parents. The record is meager about the relationship between those major producers and their manufacturing subsidiaries. It is replete, however, with evidence about the relationship between Chase and Kennecott. We do not think that appellee is justified in stating that "appellant virtually admitted that Phelps Dodge and its fabricating subsidiary were unitary." We do not represent Phelps Dodge, and do not know what the facts concerning Phelps Dodge and its fabricating subsidiary are. We have neither the knowledge on which to make an admission, nor the legal responsibility to make any admission meaningful. Appellee is therefore unjustified in attempting to make an argument that Chase and Kennecott should be consolidated because someone thinks that Phelps Dodge and its fabricating subsidiary also should be. Presumably that is appellee's position, but even that is not shown by the record.

8. As we pointed out, appellee displays a strangely inconsistent attitude toward the sanctity of the corporate entity, according to the consequences which it wishes to flow from its position. Where it can sustain a tax by dis-

regarding the corporate entity it does so, even though it is imposing a franchise tax. Where, as in *Pacific Company v. Johnson*, 285 U.S. 480, it can sustain a tax by arguing for the sanctity of the corporate entity, it does that. Yet, with all deference, we suggest that the Board cannot have it both ways. If this is a franchise tax which it is administering, then the income by which the tax is measured should be that earned by the taxed franchise. That earned by a franchise beyond the jurisdiction of the state to tax should not be taxable by it. Thus Chase's tax should be measured by its own net income, and since Kennecott cannot be taxed its income should not be assigned to Chase as a measure of the success of Chase's franchise.

Appellee discusses this case as if the sole, ultimate beneficial owner of all these corporations is Kennecott. But if the corporate entity is to be disregarded, why stop there? The ultimate beneficial ownership is not in Kennecott but in Kennecott's shareholders. Thousands of them must be individuals, since the stock is listed on the New York Stock Exchange and traded freely. Why should appellee have the right to impose a franchise tax imposable only on corporations if it disregards the entity of corporations? Why should it not be compelled to make its choice between taxing Kennecott's shareholders as if there were no corporations at all, or taxing the corporations on the values in their franchises? This question presents a substantial federal question, in view of the settled fact that taxes on corporate franchises have a recognized constitutional status in which states enjoy advantages from recognition of that status, but also must accept limitations. See *Spector Motor Service, Inc., v. O'Connor*, 340 U.S. 602, for one of the limitations. Another limitation, where a state elects to tax franchises, is that only the property and income owned by that corpo-

ration which is being taxed can be used to measure the tax on its franchise. This substantial federal question is presented when a state seeks to recognize a franchise for the purposes of taxing it, but simultaneously to ignore it when seeking to determine the measure of the tax.

This case does not present the question presented by appellee's straw man, whether the incomes of several corporations may be combined into a consolidated whole and then reallocated where each corporation in the group is merely an incorporated function in an indivisible business. Thus if Kennecott separately incorporated its mines, its smelters and its refineries, without all of which it could not produce a marketable product, the question argued by appellee would be presented and not be a straw man. That question is not present here, since Kennecott is a viable, integrated business, and so is Chase. The exception to what we have said about Kennecott lies not in its relationship with Chase but in its reliance on American Smelting for some essential functions, so that if Kennecott is unitary with any corporation it is unitary with American Smelting and Refining Company. Yet appellee has not sought to combine them, and recognizes that it cannot do so, because of their separate ownership. This reduces appellee's professed concern with unitary operation to a concentrated interest only in unity of ownership.

9. Appellee has not truly sought to support the decision of the Court of Appeal on the basis on which that court itself supported it. Appellee apparently recognizes the truth of our contention that the minor incidents consequent upon common ownership on which the Court of Appeal relied prove nothing more than common ownership and do not prove unity of operation. Thus, appellee's motion is based upon fictitious facts and not those present here,

and is not at all based on support of the decision below on the record on which it was made.

Yet it would remain true, even if the court below were correct that there were sufficient incidents of unity to justify a conclusion that the two corporations would ordinarily be unitary, that the use of a combined formula distorts the income allocable by that process to California, producing an unconstitutional result.

10. Appellee makes too much of the old California case of *Edison California Stores v. McColgan*, 30 Cal. 2d 472, 183 P.2d 16. The opinion there is permeated with indications the court was disregarding the corporate entity of the subsidiary, and on the facts it should have done so. Everything was done at the parent's office but sell the product at retail. The subsidiary had no right to order shoes to replenish inventory, and did not even have its own set of books. 30 Cal. 2d at 474, 183 P.2d at 18.

The Chase case is not one for the disregard of the corporate entity; the Court of Appeal did not do so, appellee has never so argued, and it made the assessment against Chase, not Kennecott. Appellee has even stipulated that Kennecott does not do business in California. (Stip. par. 3; Juris. Statement, App. p. 29.)

C. PUBLIC LAW 86-272.

We have shown in our first legal argument above that this federal statute prohibits assessments of tax after its enactment even for earlier years, and that these assessments were first proposed a year after that enactment.

Appellee also defends the practice it employed here on the ground that it was first adopted before 1959 and accordingly

not to circumvent P. L. 86-272. What this argument overlooks is that Congress intended to outlaw existing, demonstrated state practices which this Court had recently upheld in two cases. California was not excepted from the prohibition. If it has failed to heed the prohibition, its right to do so is a federal question, and since its position would operate to circumvent a clear Congressional prohibition, the federal question is substantial under the Commerce Clause.

D. THE AMICUS BRIEFS.

The briefs of the four amici curiae show that our contention that the case is of great importance is not merely the hopeful assertion of partisan advocacy. The same is true of their support for our contention that the federal questions presented are substantial.

From the intemperate emphasis in appellee's reply to those briefs, it would appear that appellee is of the same mind.

It is not our province to defend the briefs of the amici, but we believe reply to arguments appellee has made which may influence the Court's ruling is incumbent on us.

1. Appellee has attacked one of the amicus briefs for asserting that common ownership is enough to satisfy California's concepts of unity. The facts in this case show that Kennecott's operations were much more integrated with those of American Smelting than with Chase. Yet no effort has been made to consolidate Kennecott with American Smelting. The reason is that Kennecott owns no stock in American Smelting. Because Kennecott owns the stock of Chase, certain minor common conduct of a type that is an invariable corollary of common ownership

is said by appellee and the Court of Appeal to make the two unitary. It appears to us that the amicus is right. All that appellee really looks for seems to be common ownership, and once that is found appellee leaps onto every minor incident of common ownership, even where it lacks economic significance.

Appellee points out correctly that the Court of Appeal excluded Braden Copper Co. and Bear Creek Mining Co., both of which were wholly owned. Braden operated exclusively in Chile, under radically different economic conditions. We have been informed by responsible state officials that the Franchise Tax Board does not intend to apply the Braden decision to other cases because of the brevity of the opinion, but presumably the California courts will react differently. We can then qualify the California rule where common ownership exists by adding that California will hold the corporations unitary if both operate in the United States. Bear Creek explored in California but found no deposits so we can add that the California rule also requires that the subsidiary add either gross income or property of value to the unit as a condition to unitary status. With those minor qualifications, the amicus seems to be correct.

2. Appellee responds to the citation by one amicus of the Utah cases involving Kennecott[6] by a footnote reference (Motion, p. 46) to an account in the Salt Lake Tribune. Kennecott filed its Utah returns after 1966 in conformance with a 1966 amendment to the Utah tax statute as Kennecott interpreted it. As the newspaper account also states, the Utah Tax Commission challenged Kennecott's interpreta-

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6. *Kennecott Copper Co. v. State Tax Comm.*, 118 Utah 140, 221 P.2d 857 (1950). *Kennecott Copper Corp. v. State Tax Comm.*, 5 Utah 2d 306, 301 P.2d 562 (1956).

tion. A hearing before that body was recently held and the issues are still pending before it. Because the Utah statute differs materially from the California statute the issue herein is not presented there.

3. In seeking to disparage the status of the *amici curiae* as spokesmen for American business, appellee asserts (Motion, p. 47) that they speak only for big business, and that, they seek to shift the tax burden from big business to small business. Appellee appears to be appealing to what it must believe to be biases of the members of the Court.

If such an argument has any impact, it is an invitation to dispose of the case on the basis of prejudices borne of general biases and not on precedents and principles derived from the Constitution.

If the Court wishes a reasoned answer to that suggestion, it lies in the fact that as once passed by the House of Representatives the Willis-Rodino Bill limited its scope to multi-state businesses earning net income of $1,000,000 or less. The House evidently thought small business needed protection from state tax administrators. It would appear that it also thought that big business could be left to the protection afforded by this Court.

4. The suggestion (Motion, pp. 50-52) that Congress may soon legislate does not fully inform the Court. Public Law 86-272 provides supposedly temporary rules pending further Congressional study. That study has produced volumes of hearings and reports but not a single statute. The current Congress will end without disturbing that status.

As noted above, the one bill which passed one house of Congress exempted businesses with net incomes exceeding $1,000,000 from its scope. It would not, therefore, have pre-empted the field.

Moreover, that bill did not expressly deal with the right of the states to consolidate the net incomes of groups of affiliated corporations.

If the amici did not all support a bill with such significant omissions, they may have wanted one which would do more to provide certainty. That would be a rational hope.

Many of the states oppose federal legislation in the field. We wish appellee had told the Court what California's position is. It has sent witnesses to testify on these successive bills at least once when the testimony, as reported, was in opposition.

The Multistate Tax Compact has not been approved by the Congress which is about to end. It does not have unanimous support from the states. Of the 33 state adherents, 13 are associate members because of various reservations.

The apparent suggestion of appellee that this Court can surrender the field to Congress is unfounded. Substantial federal questions will continue to arise in it under any legislation which has had a Congressional sponsor, particularly in the field of consolidation of affiliated groups, where the committee bills and Senate sponsored bills are mute.

CONCLUSION

The Motion to Dismiss or Affirm is not only unsound but actively demonstrates how badly this field of law is in need of enlightenment from this Court. California shows by the arguments it makes in support of its motion that the administration of its law is proceeding without support from any decisions of this Court, and contrary to principles recently restated in *Norfolk & Western v. Missouri Tax Commission,* 390 U.S. 317. There are substantial federal questions presented, both under prior decisions of this

Court, under areas untouched by decisions of this Court, and concerning the effectiveness of the Congressional enactment Public Law 86-272. Probable jurisdiction should, accordingly, be noted.

San Francisco, California, December 1, 1970.

Respectfully submitted,

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Appendix

15 U.S.C. § 382

Assessment of net income taxes; limitations; collection

(a) No State, or political subdivision thereof, shall have power to assess, after September 14, 1959, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 381 of this title.

(b) The provisions of subsection (a) of this section shall not be construed—

> **(1) to invalidate the collection, on or before September 14, 1959, of any net income tax imposed for a taxable year ending on or before such date, or**
>
> **(2) to prohibit the collection, after September 14, 1959, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.**

15 U.S.C. § 383

Definition

For purposes of this chapter, the term "net income tax" means any tax imposed on, or measured by, net income.

Pub.L. 86-272, Title I, § 102, Sept. 14, 1959, 73 Stat. 556